1
2
3
4
5
6
7
8

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

9   CHRISTOPHER O'NEILL,

10   *Petitioner*,   3:11-cv-00901-LRH-VPC

11   vs.

12   ORDER

13   RENEE BAKER, *et al.*,

14   *Respondents*.

15   This habeas matter under 28 U.S.C. § 2254 comes before the Court on petitioner's application

16   (#1) to proceed *in forma pauperis*, his motion (#1-1) for leave to file a petition in excess of the allotted

17   amount, and his motion (#1-3) for appointment of counsel. The Court finds that petitioner does not

18   have sufficient funds currently on hand to pay the filing fee, and the pauper application therefore will

19   be granted. The motion for leave to file a longer petition also will be granted.

20   Following review, the Court will grant the motion for appointment of counsel, taking into

21   account the lengthy sentencing structure of concurrent life sentences with the possibility of parole after

22   ten years, the number and complexity of the claims and potential procedural issues, and the potential

23   that substantial time may remain in the federal limitation period for petitioner to present claims through

24   a counseled amended petition.[1]

25

26

27   [1] The Court makes no conclusive determination as to the federal limitation period. Petitioner and his counsel at
     all times remain responsible for calculating the federal limitation period and timely filing claims. Neither any schedule
28   established herein nor any extension granted shall operate, in and of itself, to toll the running of the federal limitation
     period.

1   Petitioner should note the following, however.

2   Federal habeas counsel is not being appointed to act as a mere scrivener to restate and reassert

3   each and every allegation and claim presented by petitioner *pro se*. The Court is not appointing counsel

4   to pursue claims or arguments that, in counsel's independent professional judgment, have no arguable

5   merit in a federal habeas corpus proceeding.

6   Petitioner thus should not assume that the Court will automatically appoint replacement counsel

7   in the event that petitioner and appointed counsel do not agree on what claims or arguments should be

8   presented. Appointed counsel's task is to pursue claims that counsel, in his or her own independent

9   professional judgment, believes that a court may find meritorious, not to present claims that petitioner,

10   who is not an attorney, believes to be meritorious. Counsel is under absolutely no obligation to "follow

11   petitioner's instructions" as to what claims or arguments to present and how to present them.

12   Accordingly, presenting the Court with an alleged conflict between counsel and petitioner based upon

13   a disagreement over how to pursue this case will not necessarily lead to an appointment of replacement

14   counsel. Subject to the circumstances presented at the time, the Court potentially instead could find that

15   the interests of justice no longer warrant the continued appointment of any counsel, based upon the

16   premise that if petitioner has such an allegedly irreconcilable conflict with one competent attorney, the

17   situation is not likely to be different with another competent attorney. Counsel, again, is not being

18   appointed to pursue claims that petitioner believes to be meritorious but, instead, is being appointed to

19   pursue claims that, in counsel's independent professional judgment, have arguable merit. Competent

20   federal habeas counsel potentially may not pursue all of the claims, allegations, and arguments in the

21   current pleading.

22   Moreover, the Court will not entertain *pro se* filings from petitioner when he is represented by

23   appointed counsel. Following the appointment of counsel, petitioner may pursue this matter only

24   through filings by counsel.

25   IT THEREFORE IS ORDERED that the application (#1) to proceed *in forma pauperis* is

26   GRANTED such that petitioner will not be required to pay the $5.00 filing fee.

27   IT FURTHER IS ORDERED that the   Clerk of Court shall file the petition and

28   accompanying motions.

-2-

1   IT FURTHER IS ORDERED that the motion for leave to file a petition in excess of the allotted

2 amount is GRANTED and that the Clerk shall reflect in docketing the motion that the motion is granted

3 by this order, in a manner consistent with the Clerk's current practice.

4   IT FURTHER IS ORDERED that the motion for counsel is GRANTED and that the Clerk shall

5 reflect in docketing the motion that the motion is granted by this order, in a manner consistent with the

6 Clerk's current practice. The counsel appointed will represent petitioner in all proceedings related to

7 this matter, including any appeals or *certiorari* proceedings, unless allowed to withdraw.

8   IT FURTHER IS ORDERED that the Federal Public Defender shall be provisionally appointed

9 as counsel and shall have thirty (30) days to undertake direct representation of petitioner or to indicate

10 an inability to do so. If the Federal Public Defender is unable to represent petitioner, the Court then

11 shall appoint alternate counsel. A deadline for the filing of an amended petition will be set after counsel

12 has entered an appearance. The Court anticipates setting the deadline for one hundred fifty (150) days

13 from entry of the scheduling order based upon the current record.

14   IT FURTHER IS ORDERED that the Nevada Attorney General shall be added as counsel for

15 respondents and that informal electronic service shall be made upon her office in a manner consistent

16 with the Clerk's current practice.   Respondents' counsel shall enter a notice of appearance within

17 twenty-one (21) days of entry of this order, but no further response shall be required from respondents

18 until further order of this Court.

19   The Clerk accordingly shall send a copy of this order (along with, in a manner consistent with

20 the Clerk's current practice, copies of the papers submitted by petitioner) to the *pro se* petitioner, the

21 Attorney General, the Federal Public Defender, and the CJA Coordinator for this Division.

22   DATED this 20th day of December, 2011.

23

24

25 _____

26 LARRY R. HICKS
   UNITED STATES DISTRICT JUDGE

27

28

-3-